IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

ELVA MAE REELEY, WIDOW, AND ON BEHALF OF THE THREE INFANT CHILDREN OF THE LATE GEORGE A. REELEY, DECEASED,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Court of Appeals of Maryland (R/49) is as yet unreported in the official State Reports. It was filed December 18, 1940, and may be found reported in full in 16 Atl. (2), 904. No written opinion was filed by Chief Judge Samuel K. Dennis, who presided at the trial of the case in the Superior Court of Baltimore City.

II.

JURISDICTION.

Jurisdiction is invoked pursuant to Judicial Code, Section 237 (b), as amended [43 Stat. 937; U. S. Tit. 28, Sec.

344 (b)], on the ground that rights, privileges and immunities under the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*) were specially set up and claimed by Respondent in and sustained by the Court of Appeals of Maryland, the highest Court of said State, by its final judgment rendered on December 18, 1940.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition for certiorari, and for brevity the statement is not repeated here.

IV.

SPECIFICATION OF ERRORS.

(1) The Court of Appeals of Maryland erred in finding and holding as a matter of law that deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act.

(2) The Court below erred in finding and holding that the question of whether deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act was not properly a question for the jury.

(3) The Court below erred in not finding and holding that the burden of proof was upon Respondent affirmatively to show that it and deceased, at the time of the injuries resulting in his death, were engaged in interstate transportation within the meaning of the Federal Employers' Liability Act.

(4) The Court below erred in finding and holding as a matter of law, upon the testimony and evidence in the record, that the remedy afforded by the Federal Employers'

Liability Act is paramount and exclusive in this case, and that the tribunals of the State are without jurisdiction to hear and determine Petitioner's claim for compensation for the death of deceased, her husband.

(5) The Court below erred in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury that deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation in which he previously had been engaged, and in finding and holding as a matter of law that deceased, when injured, was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and that the trial Court erred in not instructing the jury as a matter of law that deceased was engaged in interstate "commerce" at the time of his death, where the evidence shows, as the jury found, that prior to receiving his injuries deceased and the instrumentalities of Respondent upon which he was in attendance had been completely and finally separated and withdrawn from interstate transportation.

(6) The Court below erred in basing its conclusions that deceased and Respondent were, as a matter of law, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act on the nature of the removed shipment of ore rather than on the activities of deceased and Respondent at the time of the injuries and with relation to the road engine and tender, where the evidence shows that when deceased was injured both he and said engine and tender had previously been completely and finally removed, separated and withdrawn from said shipment of ore.

(7) The Court below erred in basing its conclusions that deceased and Respondent were, as a matter of law, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act on the finding that de-

ceased, when injured, was in an activity or service in itself only reasonably incident to interstate transportation, or merely connected with another activity or service which, in turn, had previously been involved in forwarding an interstate shipment, where the evidence shows that when deceased was injured both he and the instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn from interstate transportation.

(8) The Court below erred in finding and holding as a matter of law that the Federal Employers' Liability Act is applicable where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased when injured was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged, and the burden of proof was upon Respondent to establish jurisdiction under the Federal Act and to show that it did not exist under the State Workmen's Compensation Act.

(9) The Court below erred in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury where the evidence shows and the jury could have found, as it actually did find, that the engine and tender upon which deceased was in attendance when injured had previously been completely and finally separated and withdrawn from the shipment of ore, that they were not being used to transport anything, or to facilitate the movement of any commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation.

(10) The Court below erred in finding and holding as a matter of law that because the engine and tender, upon which deceased was in attendance when injured, had previously been engaged in an interstate haul they subse-

quently retained an interstate character and were thus still in interstate transportation within the meaning of the Federal Employers' Liability Act, where the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely and finally separated and withdrawn from all transportation and their character was wholly intrastate, and when the burden of proof was upon Respondent affirmatively to show the engine and tender, as well as deceased and Respondent in relation to them, to have been in interstate transportation within the meaning of the Federal Act when deceased was injured.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. Under the Federal Employers' Liability Act and its settled construction providing and holding that, for said Act to apply and State jurisdiction to be displaced, both the employer's and the employee's activities at the particular and precise time of injury must affirmatively be shown to have been in interstate transportation or in work so closely related to it as to be practically a part of it, the Court below was in serious error in basing its conclusions on the nature of the removed shipment of ore rather than on such activities, and in reversing the jury's findings, where the evidence shows that when deceased was injured both he and the engine and tender were completely removed from said shipment. The cases cited and relied upon by the Court below to support its finding of interstate transportation are tax cases, and do not involve the Federal Employers' Liability Act. Section 1 of the Federal Act and the many cases of this Court construing it clearly show that the nature of the removed, separated and withdrawn shipment of ore is immaterial to the determination of the status of deceased and Respondent at the time of the injuries. The true test, as provided in Section 1 of the Act and as repeatedly held by this Court, concerns only the activities of the parties at the time of injury to the employee.

2. The question of the status of deceased and Respondent at the time of his injuries depends for its answer entirely upon the facts in evidence and the controverted inferences deducible therefrom, and, as the burden was upon Respondent to establish jurisdiction under the Federal Act, and to show that it does not exist under the State Act, the Court below was in serious error in holding, as a matter of law, that the Federal Act applies where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased, at the time of his injuries, was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged. The inflexible rule, as applied by the Court below in other cases, is that the burden of proof was upon Respondent affirmatively to show that the parties were in interstate transportation within the Federal Act. The presumption is that State jurisdiction exists, and in Maryland that presumption is statutory. The Maryland statute, in addition, expressly contemplates and applies to persons in the status of deceased and Respondent. The Court below, in construing the Federal Act to be paramount and exclusive in this case, and in passing over the affect of the statutory presumption in Maryland, erroneously conceived the operation and effect of the Federal Act, so that even in respect to its construction of the Maryland statutes the decision of the Court below is not binding on this Court. In determining the legal sufficiency of the evidence as regards the question of whether the case was properly for the jury, Petitioner is entitled to the benefit of all favorable evidence and inferences, especially in view of the statutory presumption of State jurisdiction and the fact that the burden is upon Respondent to displace it. From the evidence before it the jury could have found, as it did find, that deceased when injured was engaged in intrastate work. Respondent withheld much relevant evidence, and that and the further fact that the evidence is conflicting, contradicted

and vigorously disputed in important and material respects make the question of transportation one for the jury. The jury properly passed on the credibility of the witnesses and the inferences from the facts before it, and had a clear right to believe or disbelieve such evidence as was presented to it.

3. The case was properly one for the jury on the question of deceased's status when injured, and, as the jury could have found that the engine and tender had previously been completely withdrawn from the ore shipment, that they were not being used to transport anything, or to facilitate the movement of commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation, the verdict of the jury was fully justified and the Court below was in serious error in reversing the judgment based on it. In view of the conflict in the evidence, the controverted and diverse inferences to be drawn from it, and the fact that credibility of witnesses is involved, the case is peculiarly one for the jury on the question of transportation. The Court below, in stating that the material facts are in agreement, is in error because said Court misconceives the material facts in that it holds the nature of the removed shipment of ore, rather than the activities of deceased, to be determinative and the tax cases to be controlling. However, even where material facts are in agreement a question is properly for the jury where conclusions or inferences are uncertain, and that rule has been invoked and applied by this Court in cases involving the Federal Employers' Liability Act. This Court consistently has held the question of transportation in similar cases, involving said Federal Act, to be for the jury to determine.

4. The reasoning of the Court below in holding that Federal and not State jurisdiction is appropriate is in conflict with the Federal Act and this Court's construction of it, and, if carried to its logical conclusion, would result in

including within the purview of the Federal Act every person in the employ, and every instrumentality in the service, of interstate carriers by railroad. The Court below held deceased to have been in interstate transportation on the theory that when injured he was in a connected service which was a "reasonable incident or contingency" to and of his previous service which, in turn, had been involved in the forwarding of the removed and withdrawn shipment of ore. Such a theory is in direct conflict with the Federal Act and the holdings of this Court construing it, which clearly show that for the Federal Act to apply an employee when injured must, with his employer, be in a service that has a real, substantial, close or direct relation to or affect upon interstate transportation. The question here is not the power of Congress to extend the operation of the Federal Act but only of the meaning of the Act Congress chose to enact. The fallacy of the theory applied by the Court below lies partly in the fact that it relies on the nature of the removed shipment of ore as the determinative factor of the question of transportation, and disregards the fact that the engine and tender, together with deceased and his fellow workers, were withdrawn from said shipment when the injuries occurred. Deceased's accident, or anything else that could have happened to him or the road engine and tender, did not and could not affect the shipment of ore or interstate transportation generally. This Court has, in cases involving the Federal Act, expressly rejected the theory of the Court below and pointed out that to adopt it would conflict with the Federal Act and bring within its purview all employees and instrumentalities of interstate carriers by railroad.

5. As the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely withdrawn from all transportation and their character was wholly intrastate, the Court below was in serious error in holding, as a matter of law, that because the engine and tender had previously been engaged in an interstate haul

they subsequently retained an interstate character and were thus still in interstate transportation, where the burden was upon Respondent affirmatively to show the engine and tender to have been in interstate transportation when deceased was injured. There could be no connected service, within the theory of the Court below, as regards the engine and tender because it is undisputed that when the injuries occurred they were completely withdrawn from the shipment of ore which was in charge of another engine and crew. As the rule of the Act and this Court requires the employer as well as the employee at the time of injury to be in interstate transportation as respects the instrumentalities involved, it is plain that, the engine and tender having previously been separated from the shipment of ore, Respondent was not in interstate transportation as far as were concerned said engine and tender, and the Federal Act does not apply. Respondent did not meet the burden upon it to show interstate characteristics in the engine and tender. The Court below assumed that they retained an interstate character, although separated from the shipment of ore, and, in effect, substituted that assumption for the proof required of Respondent. That assumption is at war with holdings of this Court that an engine, as such, is not permanently devoted to any kind of traffic. Deceased, Respondent, and its instrumentalities were not, at the time of the injuries, in interstate transportation as this Court has construed those terms and the meaning of the word commerce in the Federal Act. The test of Federal jurisdiction is not whether deceased when injured was in interstate "commerce", as found by the State Industrial Accident Commission and as the trial Court was requested by Respondent to instruct the jury, but whether deceased and Respondent were, when the injuries occurred, in interstate "transportation" or in work so closely related to it as to be practically a part of it. Under the holdings of this Court, and the true test of jurisdiction under the Federal Act, the State Act clearly was applicable.

1.

Under the Federal Act and its settled construction providing and holding that, for the Act to apply and State jurisdiction to be displaced, both the employer's and the employee's activities at the particular and precise time of injury must affirmatively be shown to have been in interstate transportation or in work so closely related to it as to be a part of it, the Court below was in serious error in basing its conclusions on the nature of the removed shipment of ore rather than on such activities, and in reversing the jury's findings, where the evidence shows that when deceased was injured both he and the engine and tender were completely removed from said shipment.

It is respectfully and earnestly submitted that the Court below misapplied the settled rule pronounced by this Court in construing Section 1 of the Federal Employers' Liability Act, namely, that the activities of the parties at the time of and with relation to the happening of the accident govern the status of an injured employee, and that this misapplication of the rule resulted because the Court below employed, as the determinative element of deceased's status, not his and Respondent's *activities at the time of the accident* in relation to the instrumentalities causing his death and upon which he was then in attendance, but the *then character and nature of the shipment of ore*, from which, as the undisputed evidence shows, the deceased and the engine and tender had *previously* been completely and finally separated and withdrawn. It would seem obvious, from the first authorities cited and relied upon in the discussion of the law by the Court below, that *the nature of the removed and separated shipment of ore* rather than *the activities of the parties at the time of the injury* controlled its decision, particularly because those authorities do not deal with situations involving the Federal Employers' Liability Act but are tax cases involving *the nature of goods being transported*, the holdings in those cases being that the taxes objected to were imposed by states for carry-

ing on interstate commerce and thus void. The language in this respect of the Court below, in its said discussion of the law, is: (R. 179):

> "The temporary stoppage of the interstate shipment of the ore in order to change engines was simply a handling or operation while in transit and in the ordinary course of such an interstate movement, *and was not an alteration of the nature of the shipment. Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 349; *Carson Petroleum Co. v. Vial*, 279 U. S. 95, 103."

Again, in discussing the facts, the Court below placed great emphasis on the *position and nature of the ore shipment*, although when the injuries occurred its waybills had been delivered up by deceased and the road engine with deceased in attendance had left it and was headed for the ash pit. The Court below, in this regard, said (R. 178):

> "* * * The fallacy of this reasoning (of the trial Court) lies in the exclusion of *important and determinative factors* whose existence is factually undisputed.
>
> "*The shipment of the ore was not complete until its return at the piers at the Canton terminal.* It was an element in this carriage and delivery by railway from Harrisburg to the waterside in Baltimore that the traction of the train of loaded freight cars through Pennsylvania and Maryland would not be completed by its freight engine on account of its large size, which would prevent it from going to the piers; and that, after pulling the train to the Canton yards, the freight engine and tender would necessarily leave the line of freight cars in the Canton yards *which, however, was not the end of the interstate shipment.* * * *."

Petitioner has never contended that the nature of the shipment was or became intrastate, but maintained and now maintains that, after the ore train was taken in charge by the yard crew and its engine, the waybills for the ore shipment delivered to the Canton yardmaster, and deceased

began his return trip in the opposite direction to Highland yards, the nature of the removed shipment became totally immaterial to determine his status and the inapplicability of the Federal Act. Moreover, it is submitted that the only pertinent inquiry was as to his activities and those of Respondent at the time of the injuries with relation to the particular instrumentalities upon which he was then in attendance, and not as to what he or Respondent had previously done or subsequently would do, or what Respondent through other employees was then doing, with relation to the shipment of ore with which deceased, the crew, and the instrumentalities upon which they were engaged, had severed all connection.

The language of Section 1 of the Federal Employers' Liability Act is itself perfectly clear as to what an employee must establish by substantial evidence in an action under said Act to bring himself within its provisions. That Section provides, *inter alia*, that: "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*", and, in construing said Section of the Act, this Court, speaking through Mr. Justice Van Devanter in the *Second Employers' Liability Cases*, 223 U. S. 1, said (pp. 48-49, 51-52):

> "* * * Congress, in the exertion of its power over interstate commerce, may regulate the relation of common carriers by railroad and their employees, *while both are engaged in such commerce*, subject always * * * to the qualification that the particulars in which those relations are regulated must have *a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged.* "The present act * * * deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes *while engaged in such commerce.*"

In *Chicago, B. & Q. R. R. Co., v. Harrington*, 241 U. S. 177, the employee was a member of a switching crew which, at the time of the injury resulting in his death, was transferring, with the aid of a locomotive that concededly was at times employed in interstate transportation, coal to bins or chutes from where it was supplied to other interstate locomotives. The employee's body was found beside the tracks after a collision between the coal train on which he was riding and a car of sand. In affirming an award made under a state law to his widow, and in holding that the deceased was not engaged in interstate transportation within the meaning of the Federal Act, this Court, speaking through Mr. Justice Hughes, said (pp. 179-180):

> "As the question is with respect to the employment of the decedent at the time of the injury (*Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473. 478), *it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed.* * * *
>
> "As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it'. *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, 558, and cases there cited."

In *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, the employee was, unlike deceased here, a member of a crew regularly engaged in interstate transportation, but at the time of a collision causing his death the crew was moving intrastate freight. The evidence showed that upon completing that movement the crew was to have gathered up and taken to other points several other cars as a step or link in their interstate transportation. In answer to a question certified to it by a Circuit Court of

Appeals, this Court, through Mr. Justice Van Devanter, held that, as a matter of law, the deceased employee at the time of his injuries was engaged in intrastate work, and, construing Section 1 of the Federal act, said:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the *particular service in which the employee is engaged is a part of interstate commerce.* The act was so construed in *Pederson v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146. It was there said: 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1; *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 158; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 256."

In *Erie Railroad Co. v. Welsh*, 242 U. S. 303, in which recovery was sought under a state law, the employee, a yard conductor, was injured when he stepped from a moving locomotive which, under his supervision and pursuant to orders of the yardmaster, was being returned from shifting cars, including one loaded with interstate freight, for the purpose of obtaining further orders. In affirming the holding of the State Court that, as a matter of law, the employee was at the time of his injury engaged in intrastate work, this Court, through Mr. Justice Pitney, said (p. 306):

> "It is in evidence, also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of that it is argued that his act at the moment of his injury partook of the nature of the

work that, but for the accidental interruption, he would have been called upon to perform. *In our opinion this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury,* and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

In *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, this Court, speaking through Mr. Justice Van Devanter, said (pp. 557-558):

"* * * And so it results where the carrier is also engaged in intrastate commerce *or what is not commerce at all,* that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employees, must look for redress to the laws of the State wherein the injury occurrs. * * *

"The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? *What his employment was on other occasions is immaterial* for, as before indicated, the act refers to *the service being rendered when the injury was suffered.*

"* * * We think it (the Act) speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury* engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

See also:

Illinois Cent. R. R. Co. v. Peery, 242 U. S. 292, 293;

New York, N. H. & H. R. Co. v. Bezue, 284 U. S. 415;

Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74;

North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256;

Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 356;
Pederson v. Delaware, Lack. & West. R. R. Co., 229 U. S. 146, 150;
Chicago & E. I. R. Co. v. Industrial Commission, 284 U. S. 296;
Industrial Commission v. Davis, 259 U. S. 182;
Southern Pac. Co. v. Industrial Acci. Comm., 251 U. S. 259, 263;
New York Cent. R. R. Co. v. White, 243 U. S. 188, 192;
Raymond v. Chicago, M. & St. P. Ry. Co., 243 U. S. 43.

2.

The question of the status of deceased and Respondent at the time of his injuries depends for its answer entirely upon the facts in evidence and the controverted inferences deducible therefrom, and, as the burden was upon Respondent to establish jurisdiction under the Federal Act, and to show that it does not exist under the State Act, the Court below was in serious error in holding, as a matter of law, that the Federal Act applies where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased, at the time of his injuries, was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged.

The Court below is altogether silent upon the vital and salutary rule that a railroad company which attempts to free itself from the obligation to pay and provide compensation under a workmen's compensation act must assume the burden of proving that both it and its employee were actually engaged in interstate transportation within the Federal Act at the time of injury. *Konsoute v. Pennsylvania Railroad Co.*, 287 Pa. 302, 135 A. 209, cert. den. 273 U. S. 747; *Russell v. St. Louis, S. F. Ry Co.*, 336 Mo. 845, 81 S. W. (2) 621; *Balto. & Ohio C. T. R. Co. v. Indus-*

trial Commission, 336 Ill. 223, 8 N. E. (2) 642; *Mitchell v. Louisville & N. R. Co.,* 305 Ill. A. 635, 27 N. E. (2) 861; *McCoy v. Southern Pac. Co.,* 29 Cal. A. 16, 83 P. (2) 970; cert. den. 307 U. S. 626; *Reif v. Schumacker, et al.,* (Cal. 1940), 102 P. (2) 375; *Colangelo v. Pittsburgh & L. E. R. Co.,* 336 Pa. 490, 9 A. (2) 391; *Gidley v. Chicago Short Line Ry. Co.,* 346 Ill. 122, 178 N. E. 399, cert. den. 285 U. S. 554. The Court below has itself invoked and applied that settled rule in other cases (see: *Pennsylvania Railroad Co. v. Stallings,* 165 Md. 615, 618, 170 A. 163, and cases cited).

The presumption in these kinds of cases is, of course, that the employer, while in the use and operation of its railway, is engaged in intrastate work, and in Maryland the presumption is statutory in cases under its Workmen's Compensation Act as to the applicability of said Act to injured employees, and is made express and explicit by Section 79 of Article 101 (Code of Md., 1939) which provides:

> "In any proceeding for the enforcement of a claim for compensation under this Article, it shall be presumed in the absence of substantial evidence to the contrary:
>
> (a) That the claim comes within the provisions of this Article. * * *."

That this statutory presumption contemplates and applies to employers and employees in the status of Respondent and deceased in the instant case is plain from the provisions of Section 44 of said Article 101, which provides (paragraph 3):

> "The provisions of this Article shall apply to employers and employes engaged in intrastate and also in interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, * * *."

It is, of course, conceded that the construction by the Court of Appeals of Maryland of the provisions of the State Act is to be respected whenever the application of said Act within the sphere of purely State activities is drawn in question, but it is the rule of this Court that a construction of a state statute by the state courts resulting from their erroneous conception of Federal statutes is not binding on the Federal courts (*Tipton v. Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141, 151; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120). In this connection it is submitted that although the Court below, in its own view of the facts, concluded that: "The remedy afforded by the Federal Employers' Liability Act is paramount and exclusive", nevertheless the construction and application by the Court below of both Acts were erroneous, and that it is necessary, under the present circumstances, that this Court analyze the evidence to the extent required to give to Petitioner the benefit of her claim that she has been denied relief by virtue of alleged rights asserted by Respondent under the Federal Act and based upon conclusions of fact that are without adequate or any support in the record (*Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611; *North Carolina R. R. Co. v. Zachery*, 232 U. S. 248, 258-259).

It is respectfully maintained, moreover, that, in passing upon the proposition as to whether the Court below erred in holding that Respondent's prayer for a directed verdict should have been granted at the close of the evidence, Petitioner is entitled to all the evidence favorable to her and all favorable inferences reasonably and naturally to be drawn from the evidence (*Gunning v. Cooley*, 281 U. S. 90; *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 606; *Phillips v. Union Terminal Ry. Co.*, 328 Mo. 240, 40 S. W. (2) 1046, cert. den. 284 U. S. 660; *Voelker v. Delaware, L. & West. R. Co.*, 31 F. Supp. 387 (D. C., N. Y.). The fact that the burden was upon Respondent to establish its affirmative defense under the Federal Act to the claim for compensation gives additional emphasis to the favored position in which Petitioner is to be regarded as respects

the evidence and the inferences therefrom (*cf. Osborne v. Gray*, 241 U. S. 16). The jury was entitled to expect, and the Court below ought to have held it to be a requirement, that Respondent meet its burden of proof by showing, from evidence that only Respondent could produce, all relevant matter pertaining to the issues in the case; and in the absence of such showing the jury was entitled to pass upon the credibility of the witnesses and of all the evidence before it, to believe or disbelieve them, and to draw its own inferences from the facts and base its findings thereon (*Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 498).

From the evidence before it the jury could have found that, at the time of his injuries, deceased was employed and engaged in the wholly intrastate activity of brakeman upon an engine and tender completely withdrawn from all transportation and passing between two intrastate points, both within the confines of Baltimore City, namely, Canton yards and the ash pit at Orangeville adjacent to Bay View yards. There is a conflict in the evidence as to deceased's usual duties, and as to whether he was a regular member of an interstate crew, but, insofar as such facts may have shed light on deceased's status at the time of his injuries, the jury could have found that deceased's regular employment was always in intrastate service, and that at the time of his death, preceding the injuries resulting therein, he had been given a *special assignment* on an "extra made-up train". With further regard to the duties of deceased, and in the absence of any showing by Respondent on the subject and of the production of the labor agreement which Respondent declined to produce, the jury could have found that, at the time of his injuries, deceased was in possession of definite orders to engage in or return to some totally intrastate duty immediately upon the conclusion of the work he was then doing, and that the crew with which he was working was not operating as a unit on said work but that each member had separate orders. The jury could have found that the

engine and tender upon which deceased was in attendance were, except for their use preceding the injuries, instrumentalities employed solely in intrastate work, and that only on said trip were they used interstate because of some necessity requiring the extra made-up character of the train. It could have found, further, that, upon reaching the ash pit at Orangeville, the engine and tender were to be completely withdrawn from all commerce and placed in the roundhouse there for cleaning or overhauling. From the verdict returned by the jury, and its answers to the issues submitted to it, it would seem obvious that the jury did find in general accord with what, as above outlined, it could reasonably and rationally have found and inferred from the evidence before it.

The attention of this Court is respectfully directed to the circumstance that Respondent, although in exclusive possession of full knowledge of all information bearing on the many factors that may have aided in guiding the jury toward findings favorable to it, failed or declined to offer in evidence much that may have been helpful. That circumstance, in itself, in addition to affording the jury the right to draw inferences from the lack of evidence, was sufficient to implant in the minds of the jurors the suspicion that the credibility of Respondent's evidence was questionable, and, in the exercise of its proper function, the jury had the right to believe or disbelieve such evidence as was presented to it (*Wichita Falls & Southern R. R. Co. v. Holbrook*, 125 Tex. 184, 78 S. W. (2) 938, cert. den. 296 U. S. 618).

Respondent could have shown, but did not show, as bearing on the question of deceased's status at the time of his injuries, the regular duties of deceased, whether he customarily was employed in intrastate or interstate activities, whether he was a regular member of the crew with which he was associated, or what duties, if any, he was to have undertaken following those he was at the time of his injuries engaged in. A vigorous cross-examination of Re-

spondent's employees by counsel for Petitioner failed to throw any adequate light on that question and clearly left its determination a jury matter. Respondent could have produced, but did not produce, the labor agreement mentioned in the evidence which contained provisions governing the duties and activities of its employees. It could have shown, but did not show, what facts surrounded the special assignment of deceased on the extra or extra made-up train, and the nature of such special assignment and extra train. Respondent could have shown, but did not show, what orders, if any, were in hand for the engine and tender upon reaching the ash pit, whether they were to be cleaned, overhauled or repaired there or returned to commerce. In the absence of any showing by Respondent on those subjects the jury had the clear right to, and obviously did, draw its own inferences from the facts as it found them to be.

3.

The case was properly one for the jury on the question of deceased's status when injured, and, as the jury could have found that the engine and tender had previously been completely withdrawn from the ore shipment, that they were not being used to transport anything, or to facilitate the movement of commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation, the verdict of the jury was fully justified and the Court below was in serious error in reversing the judgment based on it.

It is submitted to be clear that, as the testimony on the part of Respondent was conflicting in important and material aspects, and, as the record shows, vigorously disputed by Petitioner's counsel in the course of cross-examination, and particularly in view of the controverted and diverse inferences that could rationally be drawn from said testimony and its nature, the case was peculiarly one for determination by a jury, and the action of the trial Court

in permitting the jury to pass upon the matters at issue was correct and in accordance with the holdings of this Court. As was said by this Court, through Mr. Justice Butler, in *Gunning v. Cooley*, 281 U. S. 90, at p. 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 606. *Gardner v. Michigan Central Railroad*, 150 U. S. 349, 360. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524, 527. * * *."

Although the Court below states in its opinion that the evidence is in agreement on the material facts, it is contended by Petitioner, as hereinbefore argued, that the Court below is in error as to what are the material facts, and that the record plainly shows that important and material testimony of Respondent is, in addition to being disputed, contradictory and contradicted by Respondent's own employees. In that relation, however, it is a well-founded rule of this Court that where there is uncertainty as to the existence of a fact the question is not one of law but of fact, and this, as per Mr. Justice Brewer in *Richmond & Danville R. R. Co. v. Powers*, 145 U. S. 43, at p. 45,

> "Whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657; *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554; *Delaware & Lack. Railroad v. Converse*, 139 U. S. 469."

In cases such as that at bar where, despite the existence of conflicting or disputed evidence or inferences, it may clearly be found or inferred from the evidence that the em-

ployee was, when injured, engaged in intrastate transportation or work, this Court has not hesitated to so hold as a matter of law (*cf. Illinois Cent. R. R. Co. v. Behrens*, 233 U. S. 473; *Illinois Cent. R. R. Co. v. Peery*, 242 U. S. 292; *Erie Railroad Co. v. Welsh*, 242 U. S. 303; *Lehigh Valley Railroad Co. v. Barlow*, 244 U. S. 183); and in other cases where there are disputed matters of fact or inferences therefrom, or undisputed or uncontradicted facts susceptible of diverse and conflicting inferences, or uncertainty as to the existence of a fact, involving the question whether an employee was injured while in interstate transportation within the meaning of the Federal Act, this Court has consistently ruled that the issue of interstate transportation is properly determinable by a jury.

In *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, the employee, a fireman of a locomotive about to begin an intrastate trip, was killed when struck by another locomotive. Some of the cars of the train to be hauled by deceased's locomotive contained interstate freight. In holding that the question of deceased's status should have been submitted to the jury, this Court, speaking through Mr. Justice Pitney, said (pp. 258, 261):

> "* * * Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. * * *
>
> "We conclude that with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. *It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.*"

In *Southern Railway Co. v. Lloyd*, 239 U. S. 496, in holding the question of the employee's status to be for the jury, this Court, through Mr. Justice Day, said (p. 501):

"* * * It is insisted that the trial Court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. *In refusing the request asked, and leaving the issue to the jury, the trial Court committed no error and the Supreme Court of the state rightly affirmed the judgment in that respect. North Carolina R. R. Co. v. Zachary*, 232 U. S. 248; *Pedersen v. Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146; *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260; *Pennsylvania R. Co. v. Donat*, 239 U. S. 50."

In *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13, this Court, in holding the question of commerce to be for the jury, said, through Mr. Justice Holmes (p. 15):

"* * * The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict on the ground, among others, that it appeared as matter of law that he was so engaged. *But if the question had been left to the jury and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce there would have been no error of law in allowing a verdict for the plaintiff to stand.* * * *."

In *New York Cent. R. Co. v. Marcone*, 281 U. S. 345, this Court, speaking through Mr. Justice Stone, said (p. 350):

"The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. * * * But Petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question

whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it."

See also, for authorities supporting Petitioner's position on this point: *Illinois Cent. R. R. Co. v. Peery*, 242 U. S. 292; *Balto. & Ohio S. W. R. Co. v. Burtch*, 263 U. S. 540, 545; *Pedersen v. Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146, 153; *Pennsylvania Co. v. Donat*, 239 U. S. 50; *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352; *Palermo v. Erie R. Co.*, 173 N. Y. Supp. 456, 185 App. Div. 656; *Seyle v. Charleston Terminal Co.*, 106 S. Car. 215, 90 S. E. 1016, 109 S. Car. 99, 95 S. E. 178; *Mellon v. Weber*, 115 Oh. St. 91, 152 N. E. 753; *Howard v. Mobile & O. R. Co.*, 335 Mo. 295, 73 S. W. (2) 272; *Berry v. St. Louis & S. F. Ry. Co.*, 324 Mo. 775, 26 S. W. (2) 988, cert. den. 281 U. S. 765; *La Lone v. St. Louis M. B. T. Ry. Co.*, 316 Mo. 835, 293 S. W. 379, cert. den. 275 U. S. 524; *Smith v. Salt Lake & U. R. R. Corp.*, (Utah, 1940), 105 P. (2) 338; *St. Louis & S. F. Ry. Co. v. Fraser*, 75 Okla. 265, 183 P. 478; *Roberson v. St. Louis M. B. T. Ry. Co.*, 201 Mo. App. 672, 213 S. W. 873; *Philadelphia & R. Ry. Co. v. Berman*, 295 F. 658 (C. C. A. 3); *Flack v. Delaware, L. & W. R. Co.*, 45 F. (2) 683 (C. C. A. 2).

4.

The reasoning of the Court below in holding that Federal and not State jurisdiction is appropriate is in conflict with the Federal Act and this Court's construction of it, and, if carried to its logical conclusion, would result in including within the purview of the Federal Act every person in the employ, and every instrumentality in the service, of interstate carriers by railroad.

It would seem from the opinion of the Court below that the *rationale* of its decision is that the service in which deceased had previously been engaged was that of forwarding an interstate shipment which was still in interstate transportation at the time of the injuries, that the service in which he was engaged when injured was a *con-*

nected service with his previous service in interstate transportation, and that, as the mode of this *connected service* was a *reasonable incident or contingency* of the complete service in interstate transportation, Respondent and deceased both were, therefore, at the time of his injuries, engaged in interstate transportation. In thus reaching its conclusion that both Respondent and deceased were engaged in interstate transportation at the appropriate time, the Court below said (R. 179-180):

> "The withdrawal of the freight engine and tender from the head of the Canton yards and the taking of the cabin car from where it had been left on the spur track, which was open at both ends, were operative necessities which were *incident to the interstate transportation of the ore* * * *. Thus the service in which the brakeman *had been and was employed* at the time was primarily in forwarding of interstate commerce, and that the mode of this *connected service* at the time of the accident was a *reasonable incident or contingency* of the completeness of the service."

Petitioner emphatically disputes that the evidence in the case and the rational inferences therefrom are susceptible of establishing only the particular conclusions reached by the Court below in the factual respects stated in its opinion, and maintains, moreover, that it is not sufficient, for a case to be shown to be within the Federal Act, that injuries occur when the employee is in an activity or service that is itself not in interstate transportation but only *reasonably incident* to interstate transportation or merely *connected* with another activity or service which, in turn, may have previously been involved in forwarding an interstate shipment. The fallacy, it is submitted, of the Court's reasoning in this respect lies in the fact that it considers as the determinative factor the *nature of the shipment of ore* and the activity or relation of Respondent with regard to *it*, and not the activity of deceased, when injured, which was totally unconnected with said shipment,

and the activity or relation of Respondent *with regard to the engine and tender;* and also in the fact that the Court below concluded that, as the said shipment of ore was still in interstate commerce, an activity or service that was merely "a reasonable incident or contingency" of the complete service required to maintain the interstate character of the shipment of ore was likewise in interstate transportation within the meaning of the Federal Act.

A complete answer to that position of the Court below is contained in Section 1 of the Federal Act itself and in this Court's construction thereof in the *Second Employers' Liability Cases,* 223 U. S. 1, where, through Mr. Justice Van Devanter, it is said (pp. 51-52) that Congress could regulate the relation of common carriers by railroad and their employees, while both were engaged in interstate commerce,

> "Subject always * * * to the qualification that the particulars in which those relations are regulated *must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.*"

This Court has never departed from the rule that, in order for an employee to come within the provisions of the Federal Act, it must be affirmatively established that at the time of injury he and his employer must both have been actually engaged in interstate transportation or in work so *closely* related to it as to be *practically a part of it.* The lower courts, as well, have followed and adhered to that rule and, in cases parallel to that at bar, have stressed the required showing of a close relation to interstate transportation. See, in this connection: *Grigsby v. Southern Ry. Co.,* 3 F. (2) 988 (C. C. A. 6), cert. den. 268 U. S. 704 *Schauffele v. Director General,* 276 F. 115 (C. C. A. 3), cert. den. 257 U. S. 661; *Wise v. Lehigh Valley R. Co.,* 43 F. (2) 692 (C. C. A. 2); *Southern Pac.*

Co. v. Middleton, 54 F. (2) 883 (C. C. A. 5); *Middleton v. Southern Pac. Co.*, 61 F. (2) 929 (C. C. A. 5), cert. den. 289 U. S. 736; *Siegel v. Missouri-K.-T. R. Co.*, 342 Mo. 130, 119 S. W. (2) 376, cert. den. 305 U. S. 654; *Missouri Pac. R. Co. v. Industrial Commission*, 348 Ill. 355, 180 N. E. 912; *Spencer v. Chicago & N. W. Ry. Co.*, 336 Ill. 560, 168 N. E. 686, cert. den. 281 U. S. 736; *Cox v. Missouri Pac. R. Co.*, 332 Mo. 991, 61 S. W. (2) 962; *Mease v. Reading Co.*, 126 Pa. Super. 436, 191 A. 402, cert. den. 302 U. S. 705; *Van Brimmer v. Texas & P. Ry. Co.*, 190 F. 394 (D. C. Tex.); *Murray v. Pittsburgh C., C. & St. L. R. Co.*, 263 Pa. 398, 107 Atl. 21; *Rice v. Baltimore & O. R. Co.*, 42 F. (2) 387 (C. C. A. 6); *Pope v. Utah-Idaho Cent. R. Co.*, 54 F. (2) 575 (C. C. A. 10).

As further indicative of Congressional intent as regards the required close and substantial relationship to interstate transportation is the amendment of August 11, 1939 (53 Stat. 1404) to the Federal Act. This amendment, which was adopted subsequent to the injuries to deceased and is thus inapplicable to the instant case (see *Painter v. Balto. & O. R. Co.*, (Pa., 1940), 13 A. (2) 396, cert. den. Oct. Term, 1940; *Wichita Falls & S. R. Co. v. Lindley*, (Tex., 1940), 143 S. W. (2) 428; *Winfree v. Northern Pac. Ry. Co.*, 227 U. S. 296), obviously was intended to broaden and clarify the field of operation of the Federal Act, and provides, in part:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way *directly or closely and substantially*, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce * * *."

The original Act, its construction by this Court, and the amendment of 1939 would all seem conclusively to demonstrate that the burden was upon Respondent to establish

that, in order for the Federal Act to apply, the particular activity or service of deceased and of Respondent at the time of his injuries had, with respect to the instrumentalities upon which he was then in attendance, a real, substantial, close or direct relation to or affect upon interstate transportation; and, therefore, it was error for the Court below to have held, as a matter of law, that an activity or service not in interstate transportation in itself but merely "a reasonable incident or contingency" of another and previous service required to maintain the interstate character of a shipment was in interstate transportation.

The opinion of the Court below misses and disregards the undisputed fact that the engine and tender upon which deceased was in attendance when injured had previously been completely and finally removed and withdrawn from the interstate shipment, that the waybills for the same had been delivered up, and that there remained nothing further to be done in connection with said shipment insofar as were concerned deceased or the crew with which he was associated, or the instrumentalities in their care. If the engine and tender had been, at the time of the injuries, involved in an explosion and completely destroyed, or ceased altogether to function because of a breakdown, the affect on the interstate shipment of ore, and on interstate transportation generally, would have been invisible as far as the evidence shows. That fact alone is highly significant as showing the inapplicability of the Federal Act, whose constitutionality was sustained on the ground that it *fostered the commerce* in which employees and their employing carriers were engaged. *United States v. Lowden*, 308 U. S. 225, 237, 240.

This Court, in applying the rule that activities at the time of the injury, and not other considerations, are the determinative factors of the question of transportation has expressly rejected such reasoning as the Court below adopted and followed. The process by which the Court below reached its decision, if carried to its logical con-

clusion, would result in including within the purview of the Federal Act almost every person in the employ, and every instrumentality in the service, of an interstate carrier by railroad, because practically every employee and instrumentality could be shown to have some *incidental* or *contingent* connection with another employee or instrumentality which, in turn, would at some previous time have been, or at some subsequent time would be, directly involved in interstate transportation, and that such a result was not within the intention of Congress must be conceded (*Boston & M. R. Co. v. Armburg*, 285 U. S. 234). The question here presented is not, of course, the constitutional power of Congress to extend the application of the Federal Act to operations less direct and immediate in their relation to interstate transportation, but only as to the meaning of the Statute Congress has chosen to enact.

In *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260, this Court, speaking through Mr. Justice Lamar, said (p. 263):

> "* * * If the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles *the effect would be to give every car on the line that character.* * * *."

In *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, the state court had held, upon reasoning similar to that employed by the Court below in the instant case, that because an employee when injured was in a service directly related to instrumentalities which themselves were employed in interstate transportation he was, therefore, himself in interstate transportation. In reversing the cause and holding the employee to have been engaged in intrastate work, this Court, through Mr. Justice Roberts, said (p. 419):

> "The test thus applied is broader than our decisions justify. *All work performed in railroad employment may, in a sense, be said to be necessary to the opera-*

tion of the road. * * * But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, Lack. & West. R. Co. v. Yurkonis,* 258 U. S. 439; *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177; *Illinois Cent. R. Co. v. Cousins,* 241 U. S. 641; *New York Cent. R. Co. v. White,* 243 U. S. 188, 192; *Industrial Comm. v. Davis,* 259 U. S. 182, 187; *Chicago & N. W. R. Co. v. Bolle,* 284 U. S. 74. ' * * * Under the circumstances of this case, whether the respondent is within the act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it."

In *Industrial Commission v. Davis,* 259 U. S. 182, this Court, speaking through Mr. Justice McKenna, said (p. 187):

"* * * The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad and those employed in them are accessories to that movement, indeed, are necessary to it, *but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce.* In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so *closely* related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act."

Mayor v. Central Vermont Ry. Co., 26 F. (2) 905, aff. 26 F. (2) 907 (C. C. A. 2), cert. den. 278 U. S. 624.

5.

As the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely withdrawn from all transportation and their character was wholly intrastate, the Court below was in serious error in holding, as a matter of law, that because the engine and tender had previously been engaged in an interstate haul they subsequently retained an interstate character and were thus still in interstate transportation, where the burden was upon Respondent affirmatively to show the engine and tender to have been in interstate transportation when deceased was injured.

It is clear that, so far as the road engine and tender are concerned, there also could be no *connected service* in any sense between them and the shipment of ore, when deceased was injured, for the obvious reason that at the time of said injuries the shipment had been completely taken in charge by another engine and crew which were moving in the opposite direction. The use of said road engine and tender in all transportation had simply ended when the change in engines was made (see: *Mississippi Cent. R. Co. v. Knight*, 138 Miss. 621, 103 So. 377, cert. den. 269 U. S. 559; *Lawrie v. Atlantic City R. Co.*, 3 N. J. Misc. 267, 127 A. 818; *Geraghty v. Lehigh Valley R. Co.*, 70 F. (2) 300 (C. C. A. 2), 11 F. Supp. 378 (D. C., N. Y.), 83 F. (2) 738 (C. C. A. 2); *McDermott v. Chicago & N. W. Ry. Co.*, 124 Neb. 727, 248 N. W. 59; *Mayer v. Union R. Co.*, 256 Pa. 474, 100 A. 967, cert. den. 243 U. S. 656; *Smith v. Interurban Ry. Co.*, 186 Iowa 1045, 171 N. W. 134, cert. den. 251 U. S. 552; *Louisville & N. R. Co. v. Strange's Admx.*, 156 Ky. 439, 161 S. W. 239; *Delaware L. & W. R. Co. v. Peck*, 225 F. 261 (C. C. A. 2)).

The fallacy of the theory that an intrastate activity may be considered to be in interstate transportation because it is said to be an "incident or contingency" of another service that previously had been interstate in character, and thus bring the matter within the Federal Act, is sharply

demonstrated when consideration is given to the inflexible rule that the *employer* as well as the employee must be shown to have been in interstate transportation. Especially is said theory proven unsound when, as here, the employer's participation in the activity is through instrumentalities which, as such, are not permanently devoted to any kind of traffic, and where, as in the instant case, the evidence shows such instrumentalities to be engaged in intrastate work rather than in interstate transportation.

The burden here was upon Respondent affirmatively to show not only that deceased was, when injured, engaged in interstate transportation within the Federal Act *but also that Respondent itself was so engaged with relation to the same activity in which deceased was participating*, namely the passage of the engine and tender from Canton yards to the storage track and ash pit at Orangeville, *and with respect to the same instrumentalities.* It would seem to be undeniable that if Respondent was not so engaged with particular reference to the work deceased was doing when injured, and with respect to the particular instrumentalities upon which deceased was then in attendance, that deceased may not be considered to have been, when injured, in interstate transportation within the Federal Act.

It is not sufficient that Respondent may have been, at the appropriate time, engaged in interstate transportation involving an activity or instrumentalities other than those deceased was engaged in or employed with, otherwise every interstate carrier by railroad would always be within the Federal Act with relation to all of its employees. But it was essential and required that Respondent meet the burden upon it to show that it also was, with regard to the same activity or service and instrumentalities as those involving deceased, engaged in the requisite interstate transportation. It follows, therefore, that it was indispensable that Respondent affirmatively establish that the engine and tender were, when deceased was injured, engaged in interstate transportation as defined in the Federal Act.

This, it is submitted, Respondent utterly failed to do, although any evidence that may have thrown light on the then character of the engine and tender was exclusively within its power to adduce. The Court below plainly assumed that the engine and tender retained interstate characteristics at the time of the injuries, although the physical circumstances in the evidence pointed to and established an opposite conclusion, and the burden was upon Respondent to show that said engine and tender were interstate in character. Referring to the engine and tender, the Court below said (R. 179):

> "*No new and independent use in any form of transportation* would be begun until their return in charge of the crew to the yards at Bay View for the crew's report and receipt of orders *and thus end the trip.*"

It is implicit in this statement of the Court below that there was to be a new or independent use of the engine and tender in some form of transportation after their return to the yards at Bay View, which finding entirely overlooks the lack of evidence on this point and the fact that, from the evidence before it, the jury had the right to infer that the engine and tender were not to be put to any use but were to be cleaned at the ash pit or stored on the storage track. In direct relation to this situation is the uniform and settled rule that, in the absence of evidence of a future interstate use or movement, an intrastate character attaches to any instrumentality of commerce, or it is presumed to be in no commerce whatever (see: *Baughman v. Grand Trunk Western R. Co.*, 271 Mich. 244, 259 N. W. 897; *Rogers v. Canadian Nat. Ry. Co.*, 246 Mich. 399, 224 N. W. 429, cert. den. 280 U. S. 554; *Lavigne v. Chicago, M. & St. P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2) 785, and cases cited, cert. den. 302 U. S. 688; *Jarvis v. Chicago, B. & Q. R. Co.*, 327 Mo. 428, 37 S. W. (2) 602, cert. den. 284 U. S. 635; *Heffner v. Pennsylvania R. Co.*, 81 F. (2) 28 (C. C. A. 2); *Chicago Junction Ry. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647; *Kraemer v. Chicago & N. W. Ry. Co.*, 148 Minn. 310, 181 N. W. 847, 186 N. W. 392; *McBain v. Northern Pac. Ry. Co.*, 52 Mont. 578, 160 P. 654).

Moreover, and importantly, the language of the Court below definitely shows that its conclusion was that "the trip" in interstate transportation would not end until the return of the engine and tender to the Bay View yards, and thus that the engine and tender were still, at the time of the injuries, devoted to interstate transportation. In this connection Petitioner earnestly maintains, particularly in view of the rule as to burden of proof, that the Court below was indulging in violent assumptions totally unwarranted in the evidence, and that the interstate transportation ended, as the jury found, when the engine and tender were withdrawn from the shipment of ore at Canton yards, and the waybills there delivered up by deceased. This holding of the Court below was, it would seem, plainly in conflict with the established rule of this Court that such instrumentalities may not be presumed to be in any kind of transportation.

In *Minneapolis & St. Louis R. R. Co., v. Winters*, 242 U. S. 353, in holding an employee to have been engaged in intrastate work, this Court, speaking through Mr. Justice Holmes, said (p. 356):

> "This is not like the matter of repairs upon a road *permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic* and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be *repaired* and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, *so far as appears*, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."
>
> *Lehigh Valley R. Co., v. Barlow*, 244 U. S. 183, 184.

It is respectfully submitted to be apparent that, as distinguished from commerce in the strict technical sense of that word, neither deceased nor said engine and tender, nor Respondent with relation thereto, were, at the time of the injuries, engaged in any form of activity or service that may justly be characterized as interstate transportation within the meaning of the Federal Act. They were not then employed in the carriage of any commodity, not even empty cars, and, as pointed out hereinbefore, nothing that did occur or might have occurred in connection with the passage of the engine and tender or the work they were then engaged in would have had the slightest affect upon interstate or any form of transportation. There is not even any evidence in the record that the tracks over which said engine and tender were passing, namely, the so-called No. 2 track from Canton yards to Highland yards, were ever used for the passage of interstate goods.

This Court, in its most recent holdings in cases involving the Federal Act, has stressed the distinction between "commerce" and "transportation" and has definitely ruled that an injured employee, in order to be within said Act, must be shown, together with his employer, to have been at the time of injury engaged in interstate transportation, which has a narrower signification and is distinct from interstate commerce which covers the whole field of which transportation is only a part. Thus it was essential in the case at hand that Respondent affirmatively show by substantial evidence, in order to overcome the presumption to the contrary and to meet the burden of proof upon it, that deceased was, when injured, and that Respondent with respect to its said instrumentalities likewise was, actually engaged in the required interstate "transportation" or in work so closely, not incidentally, contingently or reasonably, related to such transportation as to be practically a part of it.

Relative to that aspect, the attention of this Honorable Court is respectfully and particularly directed to the fact

that the issue submitted to and decided by the State Industrial Accident Commission of Maryland, *at the request of Respondent*, was whether deceased was engaged in interstate "commerce" at the time of his injuries, and to the fact that Respondent's first or demurrer prayer, which the Court below, in reversing the jury's findings, held that the trial Court erred in not granting, contained the request that the trial Court instruct the jury as a matter of law that the evidence in the case showed that deceased was engaged in interstate "commerce" at the time of his death.

In *Chicago & N. W. Ry. Co., v. Bolle*, 284 U. S. 74, in holding an employee to have been in intrastate work when injured, this Court, through Mr. Justice Sutherland, said (p. 77):

> "* * * The character of the work which he did at other times, therefore, becomes immaterial. *Shanks v. Delaware, Lack. & West. R. Co.*, 239 U. S. 556, 558. * * *
>
> "It will be observed that the word used in defining the test is 'transportation', not the word 'commerce'. The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it."

Whatever doubt may have existed on the question of the showing required to bring an employee within the Federal Act was fully resolved by this Court in the recent

cases of *Chicago & N. W. Ry. Co. v. Bolle*, *supra*, and *Chicago & E. I. R. Co. v. Industrial Commission*, 284 U. S. 296, in the latter of which the previous holdings of this Court in *Erie R. R. Co. v. Collins*, 253 U. S. 77, and *Erie R. R. Co. v. Szary*, 253 U. S. 86, were definitely overruled. In the two last named cases the holdings were to the effect that the general nature of the work being done instead of the specific duty or act being performed at the time of injury should be the controlling factor in determining whether the employee was engaged in interstate transportation, but in the more recent cases mentioned that view was rejected and the rule pronounced in the *Shanks* and *Harrington* cases was applied.

In *Chicago & E. I. R. Co., v. Industrial Commission*, 284 U. S. 296, in which the state court had affirmed an award to the employee under a state act, this Court, in affirming the state court, emphasized the necessity of the showing of a close or direct relation between the activities of the parties and interstate transportation, and, speaking through Mr. Justice Sutherland, said:

> "* * * From a reading of the opinion in the *Collins* case, it is apparent that the test in the *Shanks* case was not followed (see p. 85), the words 'interstate commerce' being inadvertently substituted for the words 'interstate transportation'. The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this Court since the *Shanks* case, *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, * * *."

Under the rule thus declared by this Court to be the correct one, Petitioner respectfully submits that the errors of the Court below are fully demonstrated. The apposite parts of this Court's opinion in the *Harrington* case have already been quoted hereinabove; and in *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, this Court, in

holding the injured employee to have been engaged in intrastate work, said, in stating the rule, through Mr. Justice Van Devanter (pp. 557-558):

> "It is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in *intrastate commerce or in what is not commerce at all*, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employees, must look for redress to the laws of the State wherein the injury occurs.
>
> "* * * What his employment was on other occasions is *immaterial*, for, as before indicated, the act refers to *the service being rendered when the injury was suffered.*
>
> "* * * The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so *closely* related to it as to be *practically a part of it.*"

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its powers of review, under the authority hereinabove cited, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Court of Appeals of Maryland and finally reverse it.

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Baltimore, Maryland,
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